

LAW OFFICES OF
WILLIAM J. FRANKLIN,
CHARTERED

DOCKET FILE COPY ORIGINAL

1200 G STREET, N.W.
SUITE 800
WASHINGTON, D.C. 20005-3814

(202) 434-8770
TELECOPIER (202) 452-8757

April 2, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC. 20554

Via Messenger

Re: **Future Development of Paging Systems**
WT Docket No. 96-18; PP Docket No. 93-253
Comments of Caraway Communications

Dear Mr. Caton:

Transmitted herewith is the original and four copies of the Reply Comments of Caraway Communications on the above-captioned NPRM.

Kindly contact my office directly with any questions or comments regarding the attached.

Respectfully submitted,

William J. Franklin

William J. Franklin
Attorney for Caraway Communications

cc: Caraway Communications
Service List

No. of Copies rec'd
USA, D.C.E.

074

RECEIVED

APR - 2 1996

OFFICE OF SECRETARY

DOCKET FILE COPY ORIGINAL

RECEIVED

APR - 2 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

Revision of Part 22 and Part 90 of the)
Commission's Rules to Facilitate Future)
Development of Paging Systems)

Implementation of Section 309(j) of the)
Communications Act -- Competitive Bidding)

WT Docket No. 96-18

PP Docket No. 93-253

To: The Commission

**REPLY COMMENTS OF
CARAWAY COMMUNICATIONS
ON AUCTION LICENSING PROPOSAL**

Caraway Communications ("Caraway"), by its attorney and pursuant to Section 1.415 of the Commission's Rules, hereby replies to comments filed with respect to on aspects of the Commission's proposal to adopt auction licensing rules for commercial paging services.^{1/}

I. NUMEROUS PARTIES AGREE WITH CARAWAY THAT THE COMMISSION SHOULD PROVIDE INTERFERENCE PROTECTION BETWEEN INCUMBENT LICENSEES AND AUCTION WINNERS BASED ON EXISTING PART 22 CONTOURS.

In its Comments (at 2), Caraway supported the adoption of the Commission's existing fixed contour rules for authorized stations of both Part 22 and Part 90 licensees.^{2/} This

^{1/} Future Development of Paging Systems, 11 FCC Rcd ____ (FCC 96-52, released February 9, 1996) (WT Docket No. 96-18, PP Docket No. 93-253) (Notice of Proposed Rulemaking) ("NPRM").

^{2/} However, to give licensees the continuing flexibility to add or modify 929/931 Mhz stations, the Commission should permit its proposed formula to be applied solely for the purpose of an existing licensee's or auction winner's short-spacing of sites toward the others' contours.

would avoid the difficult legal problem of retroactively limiting the coverage contours for incumbent licensees. Numerous other parties agreed with this analysis, raising such issues as abusive licensing by third parties, (Ameritech, at 3); retroactivity (*id.*, at 6; Paging Coalition, at 13-14); prohibited consideration of auction revenues (*id.*, at 14-15); and the waste resulting from the need to re-engineer existing systems if the coverage standard changes.

Accordingly, the record in this proceeding unquestionably supports the retention of the present method for determining service and interference contours for authorized 929/931 MHz stations and currently pending applications.

II. NUMEROUS PARTIES AGREE WITH CARAWAY THAT THE COMMISSION SHOULD RETAIN EXPANSION RIGHTS FOR INCUMBENTS EVEN AFTER PAGING LICENSES ARE AUCTIONED.

In its Comments, Caraway proposed (at 2-3) a mechanism by which incumbent paging licensees would retain limited expansion rights for their systems even after paging licensees are auctioned. In Caraway's view, existing licensees must be permitted to expand their interference contours as of right on a primary basis to the extent that they can demonstrate that no other licensee (i.e., an auction winner) absolutely cannot provide service to an area using a transmitter covering a total of 130 square kilometers (50 square miles) of area (a) which is already served by the other licensee and its affiliates or (b) which is unserved.^{3/} In other words, where only an incumbent can make an incremental service expansion, the Commission's Rules should permit the expansion.

^{3/} Additionally, the Commission should adopt procedures should exist to convert secondary coverage of incumbents to primary status if either (a) the auction winner for the market either does not cover the incumbent's added coverage area during the auction winner's initial license term or (b) the auction winner loses its license for failure to construct or otherwise.

Other parties agreed with Caraway's general proposal, although they differed as to the specifics. For example, Ameritech proposed (at 11-13) that incumbents be permitted to define their protected area, consisting of their composite interference contour and all gaps therein up to 150 miles across. The Paging Coalition suggested (at 20-21) that incumbents be permitted to file for transmitters within 40 miles of their existing transmitters, or in "pockets" substantially surrounded by an existing system. Consolidated Communications Mobile Services, Inc. ("CCMS") suggests (at 9-10) that incumbents be afforded an opportunity after the auction to expand their system into contiguous unserved areas.

Permitting incumbents to have post-auction expansion rights clearly is a refinement to the Commission's proposal which needs to be adopted.

III. NUMEROUS PARTIES AGREE WITH CARAWAY THAT THE COMMISSION MUST HONOR EXISTING PART 90 CHANNEL EXCLUSIVITY IN PROVIDING 929 MHz INTERFERENCE PROTECTION.

As Caraway explained in its Comments (at 3-4), Section 90.495(c) of the Commission's Rules states that a proposed 929 MHz paging system that meets the criteria for channel exclusivity "will be granted exclusivity ... at the time of initial licensing." In other words, Section 90.495 awards the license a vested right to channel exclusivity at the time of initial grant. Accordingly, until a 929 MHz licensee loses its exclusivity rights by failing to construct sufficient paging transmitters or by failing to keep them operating, the Commission must recognize those exclusivity rights in making interference determinations with auction winners' co-channel systems.

Numerous other parties agreed with Caraway's analysis. For example, AirTouch Paging (at 8-12) argued that retention of vested exclusivity rights eliminates difficult issues of

retroactivity and prevents improper license modification.^{4/} Noting that all exclusivity issues will be resolved once a licensed system is (or is not) constructed within its 12-month deadline, AirTouch noted that "general considerations of fairness" required the Commission to honor the exclusivity rights which it had previously granted.

CONCLUSION

As set forth herein and its Comments, Caraway respectfully requests that the Commission modify its proposed auction rules as set forth herein.

Respectfully Submitted,

CARAWAY COMMUNICATIONS

By: William J. Franklin
William J. Franklin
Its Attorney

WILLIAM J. FRANKLIN, CHARTERED
1200 G Street, N.W.
Suite 800
Washington, D.C. 20005-3814
(202) 434-8770
(202) 452-8757 (telecopy)

^{4/} While AirTouch argued the point with respect to nationwide channels, the same legal and practical arguments also attach to local and regional exclusivity.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was sent by U.S. mail, first-class postage prepaid, on this 2d day of April, 1996, to:

Harold Mordkofsky
John A. Prendergast
Blooston, Mordkofsky, Jackson & Dickens
2120 L Street, N.W.
Suite 300
Washington, DC 20037

Veronica M. Ahern
Nixon, Hargrave, Devans & Doyle LLP
One Thomas Circle, N.W.
Washington, DC 20005

Dennis L. Myers
Ameritech Mobile Services, Inc.
2000 West Ameritech Center Drive
Location 3H78
Hoffman Estates, IL 60195-5000

Carl W. Northrop
Paul, Hastings, Janofksy & Walker
1299 Pennsylvania Avenue, N.W.
Tenth Floor
Washington, DC 20004

Mark A. Stachiw
AirTouch Paging
Three Forest Plaza
12221 Merit Drive
Suite 800
Dallas, TX 75251

/s/ William J. Franklin
William J. Franklin, Esq.